

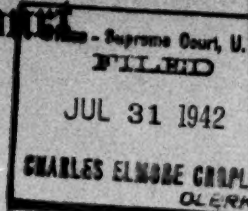
# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1942

No. 271



LAWRENCE J. ROGGE and EUGENE ROGGE,  
copartners, doing business under the  
firm name and style of Sourdough Ex-  
press, WILLIAM MILLER and MAX  
MILLER, copartners, doing business un-  
der the firm name and style of General  
Transportation Company, ALFRED  
GHEZZI, JR., BYRON GLEN ROBERTS,  
CLYDE GORDON, RICHARD ZEHNDER, and  
MORT CASS,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI  
to the United States Circuit Court of Appeals  
for the Ninth Circuit  
and  
BRIEF IN SUPPORT THEREOF.**

MORGAN J. DOYLE,

Shell Building, San Francisco, California,

*Attorney for Petitioners.*

JOHN L. MCGINN,

Shell Building, San Francisco, California,

*Of Counsel.*



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PETITION FOR WRIT OF CERTIORARI  
to the United States Circuit Court of Appeals  
for the Ninth Circuit.

*To the Honorable Harlan Fiske Stone, Chief Justice  
of the United States, and to the Associate Justices  
of the Supreme Court of the United States:*

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on June 8, 1942.

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#### **OPINION BELOW.**

The opinion of the Circuit Court of Appeals is cited in the transcript of record (pages 81 to 87).

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#### **JURISDICTION.**

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

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#### **STATEMENT OF THE CASE.**

Petitioners are truckers engaged in transporting freight and merchandise over the Richardson Highway in Alaska (R. 8).

The controversy between petitioners and respondent has arisen out of the demands of the United States for the payment of "tolls" for the transportation of freight and merchandise over the Richardson Highway that has been shipped from Seattle, Washington,



consigned to merchants and miners of Fairbanks and other settlements of interior Alaska (R. 8).

The controversy was submitted to the District Court for the Territory of Alaska, Fourth Division, upon an "Agreed Statement of Facts" (R. 2-13), pursuant to the provisions of the Alaska Code for "Submitting Controversy Without Action" (Compiled Laws of Alaska, 1933, p. 735).

#### **Richardson Highway.**

The Richardson Highway was established over the public domain in 1903 (R. 3). Ever since its establishment it has been a free public highway, except as hereinafter stated (R. 4). It affords transportation from tidewater to interior Alaska. Its southern terminus is Valdez, its northern, Fairbanks. Its length is 371 miles (R. 3, 9).

#### **Highway in competition with Alaska Railroad.**

The Richardson Highway runs parallel to the Alaska Railroad, which is owned and operated by the United States. The Highway is in direct competition with the Railroad for ocean bound and other freight and merchandise shipped from the States and other parts of Alaska, consigned to merchants and miners of Fairbanks and vicinity (R. 8, 9).

#### **Act of June 30, 1932, and regulation promulgated thereunder.**

The pertinent part of the Act of Congress of June 30, 1932 (47 Stat. 446, 48 U. S. C. A. 321 (a) et seq.) provides that:

“With the approval of the President, the Secretary of the Interior shall have power, \* \* \* *to make rules and regulations governing the use of roads, trails, and other works, including the fixing and collection of tolls where deemed necessary and advisable in the public interest*” (Emphasis supplied) (R. 5).

The Act is set forth in full on pages 4 and 5 of the Printed Record.

Pursuant to this Act, the Secretary promulgated the following regulation (R. 5-6):

“Tolls. For transportation of merchandise or freight over the Richardson Highway; there shall be charged and collected at or adjacent to the McCarty Ferry on the Tanana River, tolls equal to two and one-half ( $2\frac{1}{2}$ ) cents per ton of such merchandise or freight passing that point multiplied by the number of miles such merchandise or freight has been or is being carried over the said highway; No vehicle hauling such merchandise or freight shall be allowed to pass the designated toll station except upon payment of the tolls as herein provided. It shall be the duty of the Governor of Alaska, as ex-officio Commissioner for the Interior Department, to cause the collection of the tolls to be made in such manner as may be found most convenient and practicable, and all moneys so collected shall be deposited in the Treasury of the United States as miscellaneous receipts.

“The usual ferry charges are not affected by these regulations.”

### **Toll Station.**

In 1935 a Toll Station was established adjacent to the McCarty Ferry on the Tanana River. The Toll Station is in charge of the Alaska Road Commission, an agency of the Department of the Interior. The McCarty Ferry crosses the Tanana River and is operated as a part of the Highway. The Tanana River is 280 miles north of Valdez and 91 miles south of Fairbanks (R. 6, 7).

**Only freight that passes toll station subject to toll.**

No *toll* is levied on any *merchandise or freight transported over the highway, that does not pass the Toll Station*. No tolls are charged pedestrians, automobiles, trucks, or other vehicles that use the Highway. It is only *freight and merchandise that is shipped to Valdez from Seattle and transported north of the TANANA RIVER that is compelled to pay tolls* (R. 7, 8). The amount of the toll on freight and merchandise transported from Valdez to Fairbanks is \$9.27 per ton, plus ferry charge (R. 5, 6).

**Sole purpose of regulation is to eliminate competition with the Alaska Railroad.**

The sole purpose of the regulation is to suppress and eliminate competition over the Highway with the Alaska Railroad. That it has accomplished its purpose is manifest from the following stipulated fact (R. 9, 10):

“That the practical effect of said regulations hereinabove set forth imposing a toll upon all freight and merchandise carried over said high-

way, as aforesaid, is to substantially eliminate competition over said highway with the railroad as to freight and merchandise transported beyond the Tanana River and to the north thereof."

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### QUESTIONS PRESENTED.

The questions presented by this Petition are:

(1) Does the Act of June 30, 1932, authorize the Secretary of the Interior to Regulate Interstate Commerce?

(2) May the Secretary of the Interior, *under the guise of a toll*, impose charges for the transportation of freight over the Richardson Highway that are *so oppressive that it destroys the very thing upon which it is levied* in order to create a monopoly in the Alaska Railroad?

(3) Does the 1932 Act authorize the Secretary of the Interior to impose, fix, and collect TOLLS for freight and merchandise transported over the Richardson Highway from Valdez to points north of the Tanana River, for the sole purpose of eliminating competition with the Alaska Railroad?

(4) Does the Act authorize the Secretary of the Interior (a) to convert the Richardson Highway into a toll road and operate it as such and (b) to impose and collect, for and on behalf of the United States, TOLLS or duties on freight and merchandise that is transported over the Highway in competition with the Railroad?

(5) Does the Act authorize the United States to demand the payment of TOLLS from petitioners, and to sue for the collection thereof?

Petitioners contend that it does not. Respondent contends that:

“Both the language and the legislative history of the Act of June 30, 1932 \* \* \* make it clear that Congress intended by that Act to confer on the Secretary of the Interior authority to protect the revenues of the Alaska Railroad by charging tolls on competitive traffic transported over the Richardson Highway.” (Respondent’s Brief 7, filed in the Circuit Court of Appeals.)

The Circuit Court of Appeals upheld respondent’s contention.

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#### **REASONS FOR GRANTING THE WRIT.**

I. The Circuit Court of Appeals, in upholding respondent’s contention, has erroneously construed that portion of the Act, that provides that the Secretary of the Interior may:

“make rules and regulations governing the use of roads, trails, and other works, including the fixing and collection of tolls,”

as to make it read, in substance:

That the Secretary of the Interior, in order to protect the revenues of the Alaska Railroad, is *granted power to regulate Interstate Commerce*, by restraining the transportation of all freight and merchandise over the Richardson Highway

that is in competition with the Alaska Railroad; and, for this purpose, the Secretary of the Interior is hereby authorized:

(a) to convert the Richardson Highway—a free public highway—into a toll road, and to operate it as such;

(b) to levy and collect tolls or duties for and on behalf of the United States on all freight and merchandise transported over the Highway that is in competition with the Railroad;

(c) to make rules and regulations governing the fixing and collection of tolls;

(d) that the rate of said tolls shall be left to the discretion of the Secretary of the Interior;

(e) that no tolls shall be levied on freight or merchandise transported over said Highway that is not in competition with the Railroad; and no tolls shall be levied on pedestrians, automobiles, trucks, or other vehicles for the use of said Highway;

(f) that all tolls so collected shall be deposited in the Treasury of the United States as miscellaneous funds.

II. The Circuit Court of Appeals, in so construing the Act, has *extended and enlarged its plain language*. The Court has read into the Act the report of one House of Congress, namely the report of the Senate Committee on Commerce, in reporting this legislation. In so doing, the Court has disregarded the repeated decisions of this Court, and its own decisions, to the effect: (a) that the *plain words of a statute must be given the meaning naturally attributable to them and*

"if the language is clear it is conclusive"; and (b) that the legislative history of a statute cannot affect its interpretation where the language is clear.

*U. S. v. Resnick*, 299 U. S. 208, 210;

*Osaka Shosen Kaisha v. U. S.*, 300 U. S. 98, 101;

*Old Colony T. Co. v. Commissioner*, 301 U. S. 379, 383;

*Jeu Jo Wan v. Nagle* (9 C. C. A.), 9 F. (2) 310;

*Northern Commercial Co. v. U. S.* (9 C. C. A.), 217 Fed. 33;

*Banco Mexicano etc. v. Deutsch Bank*, 289 Fed. 924, 928.

III. The Circuit Court of Appeals, in construing said Act, has violated the canon of construction:

That statutes granting tolls "*being in restraint of common right to use the highways free of tolls*, are to be strictly construed and nothing is to be taken by implication" (65 C. J. 1144, Sec. 34; 1167, Sec. 66);

contrary to the applicable decisions of this Court and its own decisions.

*Gould v. Gould*, 245 U. S. 153, 62 L. ed. 211;

*Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666;

*Perrene v. Chesapeake & Del. Canal Co.*, 9 How. 171;

*Haiku Sugar Co. et al. v. Johnstone* (9 C. C. A.), 249 Fed. 103, 109.

IV. The Circuit Court of Appeals erred in determining that the charge imposed by the regulation was

a toll and not a tax or penalty imposed to destroy the very thing upon which it is levied, contrary to the applicable decisions of this Court in:

*Freight Tax Cases*, 82 U. S. 278;

*Carley and Hamilton v. Snook*, 281 U. S. 66,  
73-74.

And:

*Child Labor Tax Case*, 259 U. S. 20, 66 L. ed.  
817;

*Hill v. Wallace*, 259 U. S. 44, 66 L. ed. 822;

*Trusler v. Crooks*, 269 U. S. 475, 77 L. ed. 365;

*U. S. v. Butler*, 297 U. S. 1, 80 L. ed. 477;

*Carter v. Carter Coal Co.*, 298 U. S. 238, 80  
L. ed. 1160;

*Hume-Sinclair Coal Min. Co. v. Nee*, 12 F.  
Supp. 801.

V. The Circuit Court of Appeals erred in holding that the regulation did not arbitrarily, oppressively, and capriciously discriminate against petitioners, contrary to the decisions of this Court, as announced in:

*Gulf v. Ellis*, 165 U. S. 141, 155, 41 L. ed. 668;

*Yick Wo v. Hopkins*, 118 U. S. 356, 370, 30  
L. ed. 226.

#### IMPORTANCE OF QUESTION INVOLVED.

The free use of the roads and highways of Alaska in Interstate Commerce—and particularly the Richardson Highway—is a matter of general and grave importance to the people of the Territory. Both the Highway and the Railroad were constructed and are



being maintained and operated to develop the resources of Alaska. Though parallel, they serve different sections, localities, and communities. Both are essential to the development and prosperity of interior Alaska. The statement in the Opinion of the Circuit Court of Appeals that because the Richardson Highway "is usable only four months out of the year, Congress, in 1914, authorized the construction of the Alaska Railroad", is incorrect.

The object and purpose of the Railroad, as declared in the Act authorizing it, is (R. 9):

"To aid in the development of the agricultural and mineral or other resources of Alaska, and the settlement of public lands therein, and so as to provide transportation of coal for the Army and Navy, transportation of troops, arms, munitions of war, mail, and for other governmental and public uses, and for the transportation of passengers and property." (Act of March 12, 1914, 38 Stat. 305, 48 U.S.C.A. 301.)

If the judgment of the Circuit Court of Appeals is allowed to stand, the effect of it is to grant to the Secretary of the Interior a boundless and unregulated discretion as to the public roads of Alaska. He may convert particular roads into toll roads, and not others. He may *discriminate against* and practically *destroy the trade and commerce of one community, to the advantage and prosperity of another*. The commerce and trade that Valdez had with Fairbanks and interior Alaska, before the regulation was promulgated, has been destroyed and lost to the residents of Valdez, and to petitioners. Their loss, however, has been the

Alaska Railroad's and the town of Seward's gain. Clearly, the delegation of a discretion that destroys the business of petitioners and the trade and commerce of one community, to the advantage of another, in order to create a monopoly in the Alaska Railroad, is of the essence of pure and simple despotism.

It is inconceivable that Congress, by the Act of 1932, intended to delegate to the Secretary of the Interior such power. Such a delegation of authority is contrary to the declared policy of Congress as expressed in the Sherman Act, the Interstate Commerce Act, and the principles of Common Law in force in Alaska. *Surely such authority is not expressedly or impliedly granted by the plain words of the Act of June 30, 1932.*

We submit that the *correct interpretation of this Act* is a matter of *great importance* to petitioners and to the people of Alaska, and that it should be settled by this Honorable Court.

WHEREFORE, it is respectfully submitted that the Writ should be granted.

Dated, San Francisco, California,  
July 27, 1942.

MORGAN J. DOYLE,  
*Attorney for Petitioners.*

JOHN L. MCGINN,  
*Of Counsel.*

## CERTIFICATE OF COUNSEL.

I hereby certify that I am attorney for the Petitioners in the above entitled cause, and that in my judgment the foregoing Petition is well founded in law and fact, and that said Petition is not interposed for delay.

Dated, San Francisco, California,  
July 27, 1942.

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JOHN L. MCGINN,  
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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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We deem it unnecessary to repeat the statement of the cause made in the foregoing Petition. In this

brief, we will recapitulate the legal points relied upon and cite cases in their support.

The Richardson Highway, before the promulgation of the regulation by the Secretary in 1935, was a free public highway (R. 4). It was established during the gold rush to Fairbanks in 1902-1903. It belongs to the people of Alaska, under Section 2477, Rev. Stat. of the United States (43 U. S. C. A. Sec. 932, p. 216). They are its proprietors. It does not belong to the United States. The only control that the United States has over it is by virtue of its sovereignty—as a state.

*Gordon v. Nash*, 9 Alaska 701;

*Opinion of District Court* (R. 16-27).

#### TOLL ROADS CAN ONLY BE CREATED BY LEGISLATIVE GRANT.

The right to construct and operate *toll roads* is not a common right and does not exist in the absence of legislative grant. *Before a free public highway can be converted into a toll road, authority to do so must be granted in terms.* There is no act of Congress that invests the Secretary of the Interior with power to convert a free public highway into a toll road in Alaska.

65 C. J. 1127, Sec. 7;

12 R. C. L. 1402;

*Blood v. Woods* (Cal.), 30 Pac. 129, 131;

*El Dorado Co. v. Davison*, 30 Cal. 521, 524;

*Peru Turnpike Co. v. Peru*, 100 A. 679;

*Geiger v. President etc.*, 31 A. 918, 28 L. R. A. 458;

*Virginia etc. v. People* (Colo.), 45 Pac. 398, 37 L. R. A. 711;

*Elliott's Roads & Streets* (4 ed.), Secs. 96, 98;

*City of Oakland v. E. K. Wood Lumber Co.* (Cal.), 292 Pac. 1076.

The only legislation that authorizes the construction and operation of *toll roads* in Alaska is the Act of May 14, 1898 (48 U. S. C. A. 416). This Act authorizes the Secretary of the Interior to issue permits to private persons for the construction of toll roads over public lands. *The Act makes it a misdemeanor* for any person, company, or corporation to collect or attempt to collect tolls, except under the provisions thereof (Compiled Laws of Alaska, 1933, Sec. 191). The Act of 1932 does not authorize the Secretary to convert free public roads into toll roads, neither does it authorize him to impose tolls for the privilege of transporting freight and merchandise over the public roads of Alaska.

The only authority conferred upon him by the Act is to "*make rules and regulations*". The object and purpose of the rules and regulations are to regulate the use of roads "including the fixing and collection of tolls".

The meaning of the language, "fixing and collection of tolls", is plain and clear and needs no construction.

**Word "Tolls" defined.**

The word "tolls", when applied to roads, has a well-defined meaning. In its common acceptance, it has been defined, by this Court, as "a proprietor's charge for passage over a highway or bridge exacted when and as the privilege of passage is exercised".

*Carley and Hamilton v. Snook*, 281 U. S. 66, 73-74.

Cooley on Taxation (4 ed.) Sec. 14 defines "tolls", as now understood, as being:

"\* \* \* charges for the permission to pass over a bridge, road or ferry *owned by the person imposing them*. Tolls are not taxes. A tax is a demand of sovereignty; a toll is a demand of proprietorship."

*St. Louis v. W. U. Tel. Co.*, 148 U. S. 92, 37 L. ed. 380;

*State Freight Tax*, 15 Wallace, 232, 278, 21 L. ed. 146;

*Elliott's Roads and Streets* (4 ed.), Sec. 95; 62 C. J. 1077-1079;

*Anthony v. Kozar* (D. C. Ore.), 11 F. (2d) 641, 645.

**MEANING OF THE WORDS "FIXING AND COLLECTION OF TOLLS".**

To "fix" a toll is to establish a definite rate of pay for passage over a road open to the public.

To make "*rules and regulations*" fixing tolls is to prescribe a rate by which it is to be determined.

*Anderson's Law Dictionary*, p. 186;

*Morse v. Delaney*, 218 N. Y. S. 576;  
*Flagg v. Columbia* (Ore.), 94 Pac. 184;  
*Cricket v. State of Ohio*, 18 Ohio St. 9;  
*Commonwealth v. Rose* (Va.), 168 S. E. 356.

To make rules and regulations for the collection of tolls is to prescribe how and where the tolls are to be demanded and paid (Webster's Dictionary).

The words of the act being plain, they must be given the meaning naturally attributable to them. *The language being clear, it is conclusive.*

*U. S. v. Resnick*, 299 U. S. 208, 210;  
*Osaka Shosen Kaisha v. U. S.*, 300 U. S. 98,  
 101;  
*Old Colony T. Co. v. Commissioner*, 301 U. S.  
 379, 383;  
*Jeu Jo Wan v. Nagle* (9 C. C. A.), 9 F. (2)  
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*Northern Commercial Co. v. U. S.* (9 C. C. A.),  
 217 Fed. 33;  
*Banco Mexicano etc. v. Deutsch Bank*, 289 Fed.  
 924, 928.

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**WORDS OF ACT BEING PLAIN, ITS LEGISLATIVE HISTORY  
 CANNOT BE CONSIDERED BY THE COURT IN INTER-  
 PRETING IT.**

The Circuit Court of Appeals has disregarded the plain words of the Act. In order to uphold the regulation, it has read into the Act the report of one House of Congress, namely the report of the Senate Committee on Commerce in reporting this regulation. This



the Court had not the right to do, as the decisions of this Court have repeatedly determined (cases cited immediately above).

Furthermore, the Circuit Court of Appeals, in considering the report of only one House of Congress, has disregarded its own decision in *U. S. v. Lindsly*, 7 F. (2) 247, 251, 252, where it said:

“Such a statement by the committee of one house—never probably made known to the other house, and possibly not even known to the general membership of that house itself—*cannot be a guide to the interpretation of clear language, and cannot justify an interpretation that means the repeal and rejection of what has been recognized for centuries as the general law \* \* \**” (Emphasis supplied).

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**ACT OF JUNE 30, 1932, TO BE STRICTLY CONSTRUED.**

The Circuit Court of Appeals, in holding, that the Act authorizes the Secretary: (a) to convert a free public road into a toll road and to operate it as such; and (b) to impose tolls on freight and merchandise that is transported over the Highway in competition with the Alaska Railroad; has disregarded the established law and the applicable decisions of this Court that declare *that statutes imposing tolls for the use of free public roads are against common right and must be strictly construed.*

65 C. J. 1144, Sec. 34; 1127, Sec. 7; 1167, Sec. 66;

*Elliott's R. and Sts.* (4 ed.), 96.

In *Peru Turnpike Co. v. Town of Peru* (Vt.), 100 A. 679, 680, the Court said:

“‘Whoever seeks to impose tolls must support his claim by plain words’, said the Lord Chief Justice in *Portsmouth Bridge Co. v. Nance*, 46 E. C. L. 227. \* \* \*

The rule governing the construction of such grants is thus stated in the cases:

‘Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare.’ *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 649, 24 L. ed. 1036.

‘Nothing passes but what is granted in clear and explicit terms \* \* \* whatever is not unequivocally granted in such acts is taken to be withheld.’ (*Holyoke Water Power Co. v. Lyman*, 15 Wall. 500; *People v. Newton*, 112 N. Y. 396.”

In view of the plain language of the Act, and the rule of construction applicable to its interpretation, we are unable to comprehend how the Circuit Court of Appeals could hold that:

“From these statements it is apparent that the Act was designed to eliminate the highway competition so that the railroad would no longer be jeopardized, and to accomplish this purpose Congress authorized the Secretary *to impose tolls upon the highway.*”

There is a marked distinction between the words “impose” and “fix”.

We have already pointed out that to fix a toll is to establish its rate. The Century Dictionary gives some of the meanings of the words "to impose" as follows:

"To lay as a burden; to levy, inflict, or enforce, as by authority, power, or influence; as to impose taxes or penalties."

How is it possible to construe the word "fix" as giving the power to impose? Furthermore:

"If Congress had this intention, it could have been expressed in the Act; but, inasmuch as no such intention can be drawn from the language of the Act, we are not authorized, from the mere statement contained in the report of the committee either to read such an inference into the Act or to presume such an intent in Congress."

*Banco Mexicano etc. v. Deutsch Bank*, 289 Fed. 924, 928, Par. 3.

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#### CHARGE IMPOSED NOT A TOLL BUT A PENALTY.

The charge imposed by the Regulation is not a toll. It is a penalty, to suppress competition. *It is not a charge for passage over the Highway, but a charge to inhibit its use north of the Tanana River.*

The Regulation has established a line adjacent to the McCarty Ferry, where the Toll Station has been established. No merchandise or freight destined for Fairbanks or vicinity is permitted to cross this line, without first paying the charges imposed by the Regulation. The Toll Station is in reality a *customs house* and the line a tariff wall.

This line arbitrarily divides that portion of Alaska served by the Richardson Highway into two parts. Within the limits of either of these parts, freight can be transported free of all tolls. It is only when merchandise or freight crosses the line that the charge imposed by the Regulation is demanded and collected. It is therefore obvious that the so-called "toll" is not imposed for *the privilege of passage over the Highway, but solely for the purpose of inhibiting the transportation of freight in competition with the Railroad.*

The Regulation is not one authorized by the Act. It is a regulation in restraint of commerce, to destroy competition in order to create a monopoly in the Alaska Railroad.

This Court, in *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 31 L. ed. 151, said:

"\* \* \* Tolls are the compensation for the use of another's property, or of improvements made by him; and their amount is determined by the cost of the property, or of the improvements, and considerations of return which such values or expenditures should yield."

In view of the foregoing language, and of the limited power delegated to the Secretary of the Interior by the Act of June 30, 1932, we are at a loss to understand how the Circuit Court of Appeals can say, that:

"Nor do we agree that the regulation was a tax or penalty on haulers of freight and therefore not the toll authorized by the Act. \* \* \*

“The fact that Congress had for one of its purposes the elimination of competition and not the promotion of the highway, *is in no way material*, for Congress has plenary power over territories. *Binns v. United States*, 194 U. S. 486.” (Emphasis supplied.)

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**TOLL IMPOSED IS A PENALTY TO INHIBIT AND SUPPRESS  
THE VERY THING TAXED FOR THE ULTERIOR PURPOSE  
OF CREATING A MONOPOLY IN THE ALASKA RAILROAD.**

The Regulation is for one purpose only, namely: the elimination of competition. To accomplish this purpose, a charge so oppressive is imposed that it operates as a penalty. The charge is not for the purpose of *collecting revenue in order to pay for the cost of the road, the improvements thereon, and a return upon the investment—the object and purpose of all tolls—but its sole aim is to destroy—to kill—the very thing taxed, for the ulterior purpose of Regulating Commerce by restraining trade in order to create a monopoly in the Alaska Railroad.* Such an abuse of the taxing power of Congress has been repeatedly condemned by this Court.

*Child Labor Tax Case*, 259 U. S. 20, 66 L. ed. 817;

*Hill v. Wallace*, 259 U. S. 44, 66 L. ed. 822;

*Trusler v. Crooks*, 269 U. S. 475, 77 L. ed. 365;

*U. S. v. Butler*, 297 U. S. 1, 80 L. ed. 477;

*Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160;

*Hume-Sinclair Coal Min. Co. v. Nee*, 12 F. Suppl. 801.

# **REGULATION IS A REGULATION OF INTERSTATE COMMERCE.**

The reach of the Regulation is far beyond the scope of the Act, and far into a realm that is solely within the jurisdiction of Congress. It is a Regulation of Interstate Commerce. The power to regulate interstate commerce is conferred exclusively upon Congress, and is jealously guarded. *Congress did not delegate this power to the Secretary of the Interior by an Act that only authorizes him to make Rules and Regulations governing the use of roads—including the fixing and collection of tolls.*

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## **ACT OF JUNE 30, 1932, IN PARI MATERIA WITH THE ACT OF 1898.**

Unless the Act of 1932 is construed *in pari materia* with the Act of 1898, then it must be declared void, as being indefinite and incomplete. The Act contains no provision for the creation of toll roads; it does not authorize the levy of tolls; it does not specify by whom a toll road is to be operated; it does not specify the persons or things that shall be subject to tolls, nor who is to be the recipient or beneficiary thereof; nor what disposition is to be made of it. There is *no subject matter upon which the rules and regulations, that the Secretary is authorized to make, can operate.*

**UNITED STATES WITHOUT RIGHT TO SUE OR  
COLLECT FOR TOLLS.**

Under the rule of strict construction that must govern the Act under consideration, how can it be said: That the United States has the right to demand, collect and sue for the tolls here involved? The Act does not grant tolls to the United States or to anyone else. We are unable to understand upon what principle the United States predicates its right to sue for and collect tolls from the petitioners. Is it because of its sovereignty? Although we have repeatedly asked this question, it has not as yet been answered by the respondent, nor by the Circuit Court of Appeals.

Tolls, like taxes, must in every instance be appropriated by Congress. This principle is fundamental. It is one of the chief cornerstones of our constitutional form of government.

It is respectfully submitted that this Writ of Certiorari should be issued so that the judgment of the United States Circuit Court of Appeals, Ninth Circuit, may be reversed by this Honorable Court.

Dated, San Francisco, California,  
July 27, 1942.

**MORGAN J. DOYLE,**  
*Attorney for Petitioners.*

**JOHN L. MCGINN,**  
*Of Counsel.*





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# In the Supreme Court of the United States

OCTOBER TERM, 1942

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No. 271

LAWRENCE J. ROGGE AND EUGENE ROGGE, CO-  
PARTNERS DOING BUSINESS UNDER THE FIRM  
NAME AND STYLE OF SOURDOUGH EXPRESS, WIL-  
LIAM MILLER AND MAX MILLER, CO-PARTNERS,  
DOING BUSINESS UNDER THE FIRM NAME AND  
STYLE OF GENERAL TRANSPORTATION COMPANY,  
ALFRED GHEZZI, JR., BYRON GLEN ROBERTS, CLYDE  
GORDON, RICHARD ZEHNDER AND MORT CASS,  
PETITIONERS

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH  
CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINION BELOW**

The opinion of the district court (R. 16-57) and  
the opinion of the circuit court of appeals (R. 81-  
87) are not yet reported.

(1)

**JURISDICTION**

The judgment of the circuit court of appeals sought to be reviewed was entered June 8, 1942 (R. 88). The petition for a writ of certiorari was filed July 31, 1942. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

Whether the Secretary of the Interior was authorized to impose tolls upon freight and merchandise passing over the Richardson highway from Valdez to Fairbanks, Alaska, and, if so, whether the regulations imposing the tolls were reasonable.

**STATUTE INVOLVED**

Sections 2 and 3 of the Act of June 30, 1932, c. 320, 47 Stat. 446, 48 U. S. C. secs. 321a and 321b, provide:

SEC. 2. The Secretary of the Interior shall execute or cause to be executed all laws pertaining to the construction and maintenance of roads and trails and other works in Alaska, heretofore administered by said board of road commissioners under the direction of the Secretary of War; and all appropriations heretofore made, and now available, or that hereafter may be made, for expenditure by said board for meeting the cost of such work in the Territory of Alaska, are transferred to the Secretary of the Interior, to be thereafter administered

in accordance with the provisions of this Act; and the said board is directed to turn over to the Secretary of the Interior all equipment, materials, supplies, papers, maps, and documents, or other property utilized in the exercise of such powers, for the use of the said Secretary in the administration of the construction and maintenance of roads, tramways, ferries, bridges, and trails, and other works in the Territory of Alaska, heretofore administered prior to such date by said board.

SEC. 3. That with the approval of the President, the Secretary of the Interior shall have power, by order or regulation, to distribute the duties and authority transferred and appropriations pertaining thereto, as he may deem proper to accomplish a more economical and effective organization thereof, and to make rules and regulations governing the use of roads, trails, and other works, including the fixing and collection of tolls where deemed necessary and advisable in the public interest.

#### STATEMENT

In 1902 gold was discovered in the interior of Alaska. In the stampede of the following year prospectors, adventurers, and businessmen from the states disembarked at Valdez on the southern coast of Alaska and traveled northward to Fairbanks in the interior, establishing what was originally known as the Richardson Trail and what has since become one of Alaska's most important

roads, the Richardson Highway (R. 3). This road, approximately 371 miles in length, was constructed across lands which were then a part of the public domain (R. 3). In 1906 the Board of Road Commissioners for Alaska, under the direction of the Secretary of War, assumed control of the highway.<sup>1</sup> During this same year the United States constructed a ferry at the place where the highway crosses the Tanana River, approximately 280 miles north of Valdez (R. 3, 6). In succeeding years the highway was maintained and improved with federal funds (R. 3), no tolls being charged except \$1.00 for ferry service across the Tanana River (R. 8).

Since the Richardson Highway is passable only during the four-month period from June to September (R. 9), it soon became apparent that additional transportation facilities had to be provided if the resources of Alaska were to be effectively developed. Private attempts to construct a railroad having been unsuccessful, Congress in 1914 directed the President to construct and maintain a railroad in Alaska for national defense and other purposes. Act of March 12, 1914, c. 37, 38 Stat. 305, 48 U. S. C. secs. 301-308. Pursuant to this act the Government constructed, and continues to operate, a rail-

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<sup>1</sup> Act of January 27, 1905, c. 277, 33 Stat. 616, as amended by the Act of May 14, 1906, c. 2458, 34 Stat. 192.

road from Seward to Fairbanks.<sup>2</sup> This railroad, providing year-round service, is in direct competition with the highway for freight and merchandise shipped to and from the United States (R. 9). Because of the limited volume of traffic and the high cost of maintenance and operation (especially in the winter months), the Government has operated the railroad at a loss. The competition between the railroad and the highway was sufficiently serious by 1930 so that a Special Select Committee on Investigation of the Alaska Railroad was appointed by the Senate to study the situation. Its report to Congress in 1931 stated:

Another factor that has slightly affected and will increasingly affect the Alaska Railroad adversely is the competition of automobiles and trucks using the Richardson Highway that has been constructed by the Government at a cost of some \$6,383,000, and upon which, during the fiscal year 1930, was expended for maintenance and otherwise, about \$303,000.

This highway begins at the port of Valdez, some 80 miles east of the Alaska Railroad, and extends north, in a general direction parallel therewith, 408 miles to Fairbanks. \* \* \*

A Fairbanks resident importing an automobile by this route reported his running

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<sup>2</sup> The President, by Executive Order No. 3861 of June 8, 1923, placed the Alaska Railroad under the supervision and control of the Secretary of the Interior.

time from Valdez to Fairbanks as 14 hours. The running time of passenger trains between Seward, the railroad's port, and Fairbanks is 18 hours. These facts afford a notion of the competitive potentialities of this Government built and maintained highway in juxtaposition with the also Government built and maintained Alaska Railroad, and it well might be urged that these facts also denote, at least, an apparent lack of coordination in the practical promotion of Governmental activities.<sup>3</sup>

As a result of this and other studies the Senate Committee on Commerce recommended that authority over the railroad and the highway be centralized in one administrative head, "with authority for fixing and collecting tolls where necessary or advisable in the public interest."<sup>4</sup> Congress accordingly passed the Act of June 30, 1932, c. 320, 47 Stat. 446, 48 U. S. C. sec. 321 *et seq.*

Pursuant to this act the Secretary of the Interior assumed control of Richardson Highway (R. 5), and in 1935 with the approval of the President issued the following regulation (R. 5-6):

Tolls: For transportation of merchandise or freight over the Richardson Highway; there shall be charged and collected at or adjacent to the McCarty Ferry on the Tanana River, tolls equal to two and one-half ( $2\frac{1}{2}$ ) cents per ton of such merchandise or

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<sup>3</sup> See S. Rep. No. 753, 72d Cong., 1st sess., pp. 1-2.

<sup>4</sup> *Id.* at p. 3.



freight passing that point multiplied by the number of miles such merchandise or freight has been or is being carried over the said highway; No vehicle hauling such merchandise or freight shall be allowed to pass the designated toll station except upon payment of the tolls as herein provided. \* \* \* all moneys so collected shall be deposited in the Treasury of the United States as miscellaneous receipts.

The usual ferry charges are not affected by these regulations.

In conformity with this regulation a toll station was established at the ferry on the Tanana River to collect tolls on freight moving between Valdez and Fairbanks, Alaska (R. 7). The practical effect of the regulations imposing the tolls is to eliminate the competition of truckers with the Alaska Railroad (R. 9-10).

On September 18, 1939, Clyde Gordon, a trucker engaged in transporting merchandise over the Richardson Highway, brought suit in the district court for the Territory of Alaska to enjoin the Government's toll collectors from imposing tolls. Gordon contended that the regulation was arbitrary and capricious. The district court dismissed the suit upon the ground that Congress properly delegated to the Secretary of the Interior power to impose tolls on public highways of Alaska and that the tolls were not unreasonable. *Gordon v. Nash*, 9 Alaska 701 (1940).

The United States then brought this action against Gordon and other truckers to collect the tolls which they have refused to pay, and which have been placed in escrow pending a determination of this suit.<sup>5</sup> The district court held that the regulation imposing tolls was valid and rendered judgment for the United States (R. 14-15). The circuit court of appeals affirmed (R. 81-88). The truckers now request certiorari.

#### ARGUMENT

1. Petitioners, although recognizing that Congress can impose tolls for the use of the public highways of Alaska, contend that this power has not been delegated to the Secretary of the Interior (Pet. 16-22, 25, 26). This argument is without substance. Both the language and the legislative history of the Act of June 30, 1932, c. 320, 47 Stat. 446, 48 U. S. C. sec. 321, *et seq.*, make it clear that Congress intended by that act to confer on the Secretary of the Interior authority to protect the revenues of the Alaska Railroad by charging tolls on competitive traffic transported over the Richardson Highway. The statute specifically provides that the Secretary of the Interior "shall execute or cause to be executed all laws pertaining to the

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<sup>5</sup> The case was submitted to the district court upon an agreed statement of facts pursuant to Chapter XCV, p. 735, Compiled Laws of Alaska (1933).

construction and maintenance of roads and trails \* \* \* in Alaska, heretofore administered \* \* \* under the direction of the Secretary of War.”<sup>\*</sup> It further provides (section 3) that he may “make rules and regulations governing the use of the roads, trails, and other works, *including the fixing and collection of tolls where deemed necessary and advisable in the public interest.*” [Italics supplied.] The Senate Committee on Commerce, in recommending enactment of the legislation, said (S. Rep. No. 753, 72d Cong., 1st Sess., p. 2):

It must be apparent to everyone that competition between the Richardson Highway and the Alaska Railroad is becoming serious, and that something must be done to remedy the situation. This bill the purpose of which is to centralize the authority of both the railroad and highway under one administrative head, with authority to fix and collect tolls where necessary or advisable in the public interest, will, in the opinion of your committee, help very materially in solving the problem. \* \* \*

Included in the committee’s report was a letter from Secretary of the Interior Wilbur stating his interpretation of the toll provision in advance of its enactment (*id.* at p. 3):

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<sup>\*</sup> The Richardson Highway was under the jurisdiction of the War Department until the Secretary of the Interior assumed control pursuant to the Act of June 30, 1932 (R. 3, 5).

Section 3 of the proposed bill contains authority for fixing and collecting tolls where necessary or advisable in the public interest, which would enable us to control competition on the Richardson Highway with the Alaska Railroad.

Surely it cannot be said in the light of these statements that Congress did not intend, when it passed the 1932 act, to authorize the Secretary of the Interior to charge tolls for the use of the Richardson Highway. Such a construction of the 1932 act will not, as petitioners assert (Pet. 17, 25), nullify the provisions of the Act of May 14, 1898, c. 299, sec. 6, 30 Stat. 409, 411. That statute relates to the establishment of private toll roads by persons other than the United States. Hence, its provisions are not applicable to the Richardson Highway.

2. Petitioners' contention (Pet. 5, 22-25) that the tolls are in any event illegal because imposed for the ulterior purpose of protecting the revenues of the Alaska Railroad is without merit. As its legislative history makes clear (*supra*, page 9), such was the very purpose of the 1932 act. Cf. *United States v. Dickerson*, 310 U. S. 554, 561-562. Congress by virtue of its plenary power over the Territory of Alaska (*Binns v. United States*, 194 U. S. 486) may pass legislation regulating and re-

stricting highway competition; it may even grant the railroad a complete monopoly. Cf. *Sproles v. Binford*, 286 U. S. 374, 394; *Stephenson v. Binford*, 287 U. S. 251, 271-273.

Nor are the tolls arbitrary and unreasonable because imposed on freight and merchandise only. The inherent differences between passenger and freight traffic, between private cars and motor-trucks, are differences sufficient to justify the classification in question. *Stephenson v. Binford*, 287 U. S. 251, 264 (1932). Then, too, as the district court pointed out (R. 55), the Secretary of the Interior may well have believed that highway competition for four months of the year might precipitate closing of the railroad needed throughout the year. The Secretary had ample authority under the 1932 act to forestall that eventuality.

And, finally, the fact that only a single toll station has been established to collect the tolls in question does not invalidate the Secretary's regulation (cf. Pet. 22-23). A single station at the Tanana River is sufficient, because of its strategic location, to enable the Secretary of the Interior to control the trucking operations which are most competitive with the Alaska Railroad.

#### CONCLUSION

The decision of the circuit court of appeals is in accord with the applicable decisions of this

Court, raising no new question of substance, and presents no conflict. It is therefore respectfully submitted that the petition should be denied.

CHARLES FAHY,  
*Solicitor General.*

NORMAN M. LITTELL,  
*Assistant Attorney General.*

VERNON L. WILKINSON,  
*Attorney.*

AUGUST 1942.

